LIBRARY
SUPREME COURT, U. S.

FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-262

PEARLY MAE CARTER,

Petitioner,

versus

MOREHOUSE PARISH SCHOOL BOARD,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

Robert W. Kostelka
District Attorney
Fourth Judicial District of Louisiana
300 St. John Street
Monroe, Louisiana 71201
Attorney for Respondent

Of Counsel:
Charles A. Traylor
Assistant District Attorney
Fourth Judicial District
of Louisiana
300 St. John Street
Monroe, Louisiana 71201

INDEX

	Page
I. STATEMENT OF THE CASE	1
II. REASONS FOR NOT GRANTING WRIT	3
III. CONCLUSION	10

TABLE OF CASES

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965) 8

Bringegar v. San Ore Const. Co., 302 F. Supp. 630, D.C. Ark 1969 4

Citron v. Aro Corp., 377 F.2d 750 (3rd Cir. 1967) 6

Colonial Refrigerated Transp., Inc. v. Mitchell, 403 F.2d 541 (5th Cir. 1968) 4

Curko v. William Spencer & Son, Corp., 294 F.2d 410 (2nd Cir. 1961) 6

Faudree v. Iron City Sand & Gravel Co., 315 F.2d 647 (3rd Cir. 1963) 4

Ford v. United Gas Corp., 254 F.2d 817 (5th Cir. 1958) 7

Freifield v. Hennessy, 353 F.2d 97 (3rd Cir. 1965) 7

Frito-Lay, Inc. v. Morton Foods, Inc., 316 F.2d 298 (10th Cir. 1963) 8

Gordon v. Robinson, 210 F.2d 192 (3rd Cir. 1954) 4

Louisiana & A. Ry. Co. v. Moore, 229 F.2d 1 (5th Cir. 1956) 7

Maryland Casualty Co. v. Reid, 76 F.2d 30 (5th Cir. 1935) 6

N.L.R.B. v. Red Spot Elec. Co., 191 F.2d 697 (9th Cir. 1951) 7

TABLE OF CASES (Continued)

Oslund v. State Farm Mut. Auto. Ins. Co., 242 F.2d 813 (9th Cir. 1957) 4

Pfau v. Whitcover, 139 F.2d 588 (4th Cir. 1943) 4

U.S. v. National Biscuit Co., 25 F.Supp. 329, D.C. S.D. New York, 1938 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 70-262

Pearly Mae Carter,

Petitioner,

versus

Morehouse Parish School Board,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

I. STATEMENT OF THE CASE

Appellant, in its statement of the case, said that Mrs. Carter pretended to be taking the test and *randomly* marked answers. This is misleading. The record does not show that she marked the answer sheet without benefit of the questions. R.9.

Also misleading is the bare statement that Mrs. Carter's answer sheet was destroyed. Mrs. Bright, the test administrator, told the court that answer sheets are always destroyed after the grades are recorded, as a regular procedure. R.25. The materials used in testing are controlled, accountable items, that must be returned to the central office in order to insure the integrity of the testing system. R.26, 27.

Appellant also stated that Mrs. Carter was forced to take the second test. Actually, by scoring poorly on a fourth grade level achievement test, Mrs. Carter created a bad image of herself as a teacher, whether or not it was sincerely taken. Mr. Harper, the School Superintendent, indicated to Mrs. Carter that if she would take the second test and do well on it, the problem they were confronted with would be solved. R.18.

Also Appellant made the statement that Mrs. Carter was required to take the second test "to prove her ability to the white people who thought black teachers were not competent." Mr. Harper admitted making a similar statement but testified that this was something a white teacher in the same circumstance would also have to do to prove himself and specifically denied that any racial bias was involved in this case. R.21.

In relating the Court of Appeals ruling, Appellant said that the court held Respondent School Board's failure to object to the judge making a decision before hearing its evidence was excusable because they "had no opportunity to object as contemplated by Fed. R. Civ. P. 46". This was not in fact the Court of Appeals' holding. The opinion stated that "although the defendant had numerous witnesses present and ready to testify on the issue of Mrs. Carter's incompetency, the proceedings were thereupon terminated" and that "(a)lthough appellants made no objection to this procedure, they could not reasonably have been expected to do so." There was no citation of Rule 46.

II. REASONS FOR NOT GRANTING WRIT

A. THE PROPER INTERPRETATION OF FED. R. CIV. P. 46 IS NOT AT ISSUE SINCE THE COURT OF APPEALS RULED ON THE SCHOOL BOARD'S ALLEGED FAILURE TO OBJECT TO DENIAL OF BASIC RIGHT TO BE HEARD, WITHOUT REFERENCE TO THE RULE.

Contrary to Appellant's contentions on page 6 of its application for writs, the Court of Appeals decided this case without citation of or reference to Fed. R. Civ. P. 46. All that the court said in connection with the School Board's failure to express its objection to the District Court Judge ruling without hearing defendant's evidence was in the Court of Appeals opinion as follows:

> "It is our opinion that the district court committed error in choosing not to hear the defendant's evidence in rebuttal. *Although appellants made no objection to this procedure, they could not reasonably have been expected to do so.*" (emphasis added)

Therefore, the Court of Appeals decision could not possibly work to confuse federal trial practice as to the Rule. This Court of Appeals case cannot correctly be cited as an interpretation of Fed. R. Civ. P. 46. Since *Carter v. Morehouse Parish School Board*, the law concerning Rule 46 remains unchanged.

We admit that there is apparent confusion in the federal jurisprudence over the correct use of the Rule, which according to its language, is concerned with exceptions to *rulings or orders* of the court. Contrarily, in many of the federal decisions Rule 46 is interpreted as applying to original exceptions, not only to exceptions to ruling or orders of the court. See *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541 (5th Cir. 1968), *Bringegar v. San Ore Const. Co.*, 302 F. Supp. 630, D.C. Ark 1969. It appears that generally objections are always necessary to preserve the question for review and under the new rule only failure to except to *rulings* on objections when there is no opportunity to do so does not prejudice the party thereafter. See *Pfau v. Whitcover*, 139 F. 2d 588 (4th Cir. 1943), *Faudree v. Iron City Sand & Gravel Co.*, 315 F.2d 647 (3rd Cir. 1963). But the cases using Rule 46 confuse it to mean that an original objection, as with which our case is concerned, is excused under the "no opportunity" clause. There is also confusion in using Rule 46 to reduce the formality required for original objections, instead of *rulings* on objections. See *Gordon v. Robinson*, 210 F.2d 192 (3rd Cir. 1954), *Oslund v. State Farm Mut. Auto. Ins. Co.*, 242 F.2d 813 (9th Cir. 1957). Admitting that confusion exists with regard to Rule 46, we contend that this case is not a proper one in which to attempt to clarify its application. All the Court of Appeals said was that in this particular case, at the particular time an objection would ordinarily be required, one was not reasonably expected because the error occurred just before final judgment was announced.

Should the Appellant contend, even without relying on the application of Rule 46, that this decision of the Court of Appeals allows defendant school boards to wear down black plaintiffs by reversals on errors not objected to, there is no problem with this case. The court did not in any way say that objections were not required to preserve questions for appeal, except where it would not be reasonable to expect an objection, such as in this case where the final judgment came right on the heels of the error brought up for review. This situation could not happen often enough to be of any significance as a weapon of attrition.

B. IF RULE 46 SHOULD BE APPLICABLE, IT MAY BE SAID THAT THE COURT ASSUMED DEFENDANT SCHOOL BOARD TOOK AN OBJECTION TO ITS RULING BEFORE AFFORDING DEFENDANT OPPORTUNITY TO PRESENT EVIDENCE OF MRS. CARTER'S INCOMPETENCE AS A TEACHER.

In *U.S. v. National Biscuit Co.*, 25 F. Supp. 329, D.C. S.D. New York, 1938, the court, upon directing verdict for the defendant assumed that plaintiff took an objection to that ruling in accord with this rule under which formal exception is unnecessary. Here the judge had before him both sides of the case and directed a verdict upon the motion, assuming a proper objection complying with Rule 46. How much more proper would it be for a judge to assume objection by the party decided against before that party's side of the case had ever been presented. In a case where the error committed is so basic and obviously prejudicial, especially where the final decree comes directly after

that error, objection could reasonably be said to be implicit and the lack of explicitness could be justified by the time at which the error occurred.

C. EVEN SHOULD AN OBJECTION BE REQUIRED UNDER RULE 46 AND IF AN IMPLIED OBJECTION CANNOT SERVE, ALTHOUGH THERE IS NO OPPORTUNITY TO OBJECT UNTIL AFTER FINAL JUDGMENT, THE COURT OF APPEALS HAS DISCRETIONARY POWER TO REVIEW THE ALLEGED ERROR ON ITS OWN MOTION IN THE INTEREST OF JUSTICE.

Federal jurisprudence solidly supports the discretion exercised by the Court of Appeals in this case in order to prevent the School Board from being denied its basic right as a litigant, the right to be heard. *Curko v. William Spencer & Son, Corp.*, 294 F.2d 410 (2nd Cir. 1961).

> "Absence of timely objection does not necessarily preclude consideration of error which may have resulted in miscarriage of justice," *Citron v. Aro Corp.*, 377 F.2d 750 (3rd Cir. 1967) certiorari denied 88 S.Ct. 473.
>
> "New trial may be granted by federal appellate court though no objection is made and no exception is taken, where error is so great that justice requires that it should be corrected." Jud. Code Sec. 269, as amended Fed. Rules Civ. Proc. rules 59, 61, 28 U.S.C.A.; *Maryland Casualty Co. v. Reid*, 76 F.2d 30 (5th Cir. 1935).

> "An appellate court may notice plain errors, even though they were not properly excepted to below." *Louisiana & A. Ry. Co. v. Moore,* 229 F.2d 1 (5th Cir. 1956), certiorari denied 76 S.Ct. 849.
>
> "It is customary for appellate court to take notice of manifest error to which no exception has been taken." *N.L.R.B. v. Red Spot Elec. Co.,* 191 F.2d 697 (9th Cir. 1951).

A fortiori, it has been held that a court *must* notice and correct the error if it is fundamental and highly prejudicial and the failure to object may have resulted in miscarriage of justice. *Freifield v. Hennessy,* 353 F.2d 97 (3rd Cir. 1965).

Appellant quoted the court in *Ford v. United Gas Corp.,* 254 F.2d 817 (5th Cir. 1958) certiorari denied 79 S.Ct. 40 to say:

> "A litigant may not, speculating on a verdict without making objection keep silent while matters are transpiring in the trial court and then put the trial judge in error by assigning error in the appellate in respect of them. . ."

But Appellant did not finish the quoted sentence which ends with the words *"except in case of plainly prejudicial error."* (emphasis added) We need not question where a party would be subject to a more prejudicial error than in the case where he is ruled against before he has the opportunity to present his evidence to rebut plaintiff's charge.

D. FINALLY, THE COURT OF APPEALS HOLDING THAT A VERDICT BASED ON UNCONTESTED EVIDENCE DENIES DUE PROCESS, IS NOT ONLY IN ACCORD WITH RECENT JURISPRUDENCE BUT PROVIDES WISE AND CRUCIAL GUIDANCE FOR FUTURE LITIGATION BETWEEN PERSONS OF DIFFERENT RACES.

A fundamental requirement of due process is the opportunity to be heard. See *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187 (1965). Respondents contend that it was a denial of this basic right for the judge to rule without first hearing all the evidence from both sides of the case.

> "An expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in Court." *Frito-Lay, Inc. v. Morton Foods, Inc.*, 316 F.2d 298 (10th Cir. 1963).

The Court of Appeals cited *Armstrong* and *Frito-Lay* in their opinion reversing the District Court in favor of Morehouse Parish School Board, Respondent in the present case.

In their application to this Court for writs, Appellants contend that the judge had the right to decide the case summarily because the written finding of fact and judgment of the District Court contained statements that as a "matter of fact, plaintiff's dismissal was racially motivated", and propose that once a district judge notes or finds racial motivation the case need

not proceed any further Certainly, even if there was evidence of racial motivation, of which there was *none* in the present case, the opposing side is due the opportunity to present a rebuttal of some kind. If a court is allowed to decide a matter summarily, giving oral reasons indicating no finding of racial discrimination, without hearing defendant's evidence, where no evidence of racial discrimination exists, there merely being a black plaintiff and a white defendant, an extremely dangerous, if not disastrous precedent would be set for the future. The power of a local school board to guard the quality of education provided for both blacks and whites would be destroyed. All that a black teacher would have to show when charged with incompetence, no matter how incompetent he might be, would be that he was black, if Appellant's contentions were accepted. Certainly more problems would be created by this sterilization of the local school board than could possibly be solved by such a complete relaxation of a black plaintiff's burden of proof, and stifling of defendant's Constitutional right to be heard.

Appellant closes his formal application for writs to this Honorable Court with the statement that:

> "Whereas it appears black teacher dismissal suits will continue to increase in number, this Court should settle the question whether there is any defense to a *proven* racially motivated dismissal." (emphasis added)

Respondent School Board would agree fully with Appellant's statement, but it has no relevance to this case. As we stated in our brief for the Court of Appeals:

> "This case deals plainly and simply with the lawful dismissal of a teacher who was incompetent in the opinion of the Superintendent of Schools of Morehouse Parish and the Morehouse Parish School Board. We respectfully direct Your Honors' attention to the entirety of the record made up on September 7, 1970, at the hearing before the United States District Court for the Western District of Louisiana which we submit *contains not one scintilla of evidence to justify any allegation of racial prejudice or impropriety by the Superintendent or the Board.*"

Much less would the record justify a summary decision of the case on a racial basis not giving the defendant the benefit of the real reasoning behind the decision or even a chance to rebut that evidence which was actually presented by the plaintiff.

Certainly because the respective parties to a lawsuit happen to be of different races is no justification to abate the Constitutional guarantees due to either of the parties. The Appellants have cited no authority to support their position as to this point, and Respondent respectfully submits that none exists.

III. CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Robert W. Kostelka
District Attorney
Fourth Judicial District
of Louisiana
300 St. John Street
Monroe, Louisiana 71201
Attorney for Respondent

Of Counsel:
Charles A. Traylor
Assistant District Attorney
Fourth Judicial District
of Louisiana
300 St. John Street
Monroe, Louisiana 701201

CERTIFICATE

I, John E. Jackson, Jr., a Member of the Bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing has been served upon opposing counsel of record, Carl Kidd, Esq., 310 South Grand, Monroe, Louisiana 71201, by placing a copy of the same in the United States Mail this date, postage prepaid, and properly addressed.

New Orleans, Louisiana, this ____ day of September, 1971.

John E. Jackson, Jr.
Second Assistant Attorney General